Bridge to Nowhere: The Right to Integrity and the Accuracy and Weight of the Charter Explanations

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I. INTRODUCTION

Two decades old and one decade in force, the Charter of Fundamental Rights of the European Union (CFR, Charter) remains in its infancy.[1] The shape and effect of its provisions are still, for the most part, nascent. That is particularly true of the 'new' rights that are conventionally cited as proof of the Charter's innovative nature, such as the right to data protection (Article 8) and the right to integrity of the person (Article 3).[2]

In this context, the Explanations to the Charter appear to provide much-needed clarity.[3] Primary law requires that courts give 'due regard' to these Explanations in interpreting the Charter, and they seem to provide two things: a reliable map of the roots of the Charter rights, and a stake against which the drafters intended those sprouting saplings to grow. Writing in 2020, the President of the Court of Justice of the European Union (CJEU) and José A. Gutiérrez-Fons asserted that the Explanations' interpretative value exceeded that of *travaux préparatoires*, that the authors of both the Lisbon Treaty and the Charter itself 'insisted on their importance' and that it would be 'very difficult, if not impossible, for the Court to go against the Explanations'.[4]

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[1] Charter of Fundamental Rights of the European Union [2007] OJ C310/1 (republished [2016] OJ C202/389). For the various iterations of the Charter and its *travaux préparatoires*, see N Coghlan and M Steiert (eds), *The Charter of Fundamental Rights of the European Union: The* Travaux Préparatoires *and Selected Documents* (Florence, EUI, 2020).

[2] Amongst many examples, see *Special Eurobarometer 487b: Awareness of the Charter of Fundamental Rights of the European Union* (June 2019) 2, https://europa.eu/eurobarometer/surveys/detail/2222, accessed 27 September 2023.

[3] Explanations relating to the Charter of Fundamental Rights [2007] OJ C303/17.

[4] K Lenaerts and JA Gutiérrez-Fons, *Les méthodes d'interprétation de la Cour de justice de l'Union européenne* (Brussels, Bruylant, 2020) paras 237–38 (my translation). I am grateful to Romain Tinière for drawing my attention to this passage.

This chapter will argue that, at least in some cases, the Explanations' clarity is a mirage. It will do so by focusing on the right to integrity referred to above. Section II will sketch the history of the Charter and the claimed basis of the authority of its Explanations. Section III will critically analyse the interpretation of Article 3 in light of this claimed authority. It shows that the clarity the Explanations appear to provide is misleading in different ways as to the three points I consider: whether Article 3 contains principles; the roots and shape of the eugenics prohibition; and the shape of the commercialisation prohibition. Section IV will then revisit the history and legal status of the Explanations, arguing that they require critical analysis and are, at least in some cases, of limited weight. Lenaerts and Gutiérrez-Fons's different view is premised on historical and legal misunderstandings. The Conclusion will briefly touch on broader questions as to the status and legitimacy of soft law in the Union legal order.

II. BACKGROUND – THE CHARTER AND ITS EXPLANATIONS

The majority of the Charter was drafted by a Convention that worked between 17 December 1999 and 2 October 2000 (the Charter Convention).[5] According to this Convention's mandate, the case law of the European Court of Justice (ECJ) already 'confirmed and defined' the requirement that the Union respect fundamental rights. The purported aim was to codify, not create: 'the fundamental rights applicable at Union level should be consolidated in a Charter and thereby made more evident'.[6] At the same time, this Convention had two institutional innovations. First, its sixty-two members were drawn from four 'components': thirty Members of the European Parliament (MEPs), sixteen national Parliamentarians, fifteen Representatives of Heads of State or Government, and one representative of the Commission President.[7] Second, it sought to work transparently, meeting in public and publishing the majority of its documents online in real time. These two facts, together with the stature of some of its members, seemed to give the Charter Convention the authority and even pressure to go beyond a mere codification of rights.[8]

Within this Convention, a six-strong 'Praesidium' or drafting committee led and coordinated the work, including issuing drafts of the Charter. Here, the balance of power was different: it consisted of three executive representatives,

[5] For more detail, see Coghlan and Steiert (n 1) 16–21, on which this paragraph is based.

[6] 'Presidency Conclusions of the Cologne European Council, 3 and 4 June 1999', Council Document 150/99 REV 1, para 44 and Annex IV. Compare, now, the preamble to the Charter and recital 6 of Protocol (No 30) [2010] OJ C83/313.

[7] Most members also had 'alternatives', some of whom were active participants, and others were present as observers (notably from the Council of Europe and Court of Justice).

[8] See Coghlan and Steiert (n 1) 17 and sources cited.

one MEP, one national Parliamentarian and the Commission representative. The Praesidium was assisted by a Secretariat headed by Jean-Paul Jacqué, a Director in the Council Legal Service from 1992 to 2008.

The resulting Charter was 'solemnly proclaimed' as a soft law instrument on 7 December 2000, with its legal status to be determined later. The Convention on the Future of Europe (2002–2003) (the Second Convention) – which replicated the Charter Convention model on a grander scale, with 102 members – and Inter-Governmental Conferences (2003–2004) produced the draft Constitutional Treaty.[9] This incorporated the entirety of the Charter, with certain amendments, as Part II of the draft Treaty. After this Treaty's failure, the Treaty of Lisbon conferred binding effect on the amended Charter by reference: Article 6(1), first paragraph of the Treaty on European Union (TEU).

This current version of the Charter was published in the Official Journal in 2007.[10] The Charter's Explanations immediately followed.[11] These consist of an article-by-article commentary on the Charter's provisions, similar in form to the explanatory reports that regularly accompany modern Council of Europe conventions. I will explore the history and nature of this curious document in more detail in Section IV, but at this stage it is necessary to sketch the conventional understanding of their authority and nature.

According to primary law, courts must give the Explanations 'due regard' in interpreting the Charter: Article 6(1), third paragraph TEU; Article 52(7) CFR; and the Charter's preamble, fifth paragraph.[12] This phrase is, however, tautological: its meaning depends on the amount of regard that the Court considers to be due.[13] That in turn depends on one's understanding of the history, nature and substantive authority of the Explanations themselves.[14]

[9] Treaty establishing a Constitution for Europe [2004] OJ C310/1.

[10] Charter of Fundamental Rights of the European Union [2007] OJ C303/1.

[11] Explanations relating to the Charter of Fundamental Rights [2007] OJ C303/17.

[12] See also the third recital of Protocol (No 30) which (incorrectly) states that Art 6(1) TEU requires the Charter to be interpreted 'strictly in accordance with the explanations'.

[13] Compare K Bradley, 'Agreeing to Disagree: The European Union and the United Kingdom after Brexit' (2020) 16 (3) *European Constitutional Law Review* 1, 21–22. Note that the French wording of this obligation (the Explanations must be 'dûment prises en considération': Art 52(7) CFR) is similar to, if arguably slightly stronger than, national courts' general obligation to take relevant soft law 'into consideration' ('prendre … en considération') in interpreting hard law: Case C-322/88 *Grimaldi v Fonds des maladies professionnelles* [1989] ECR 04407, paras 18–19. I am grateful to Emilia Korkea-aho for drawing my attention to this point.

[14] The key texts in the debate on the Explanations' status, explored further in section IV, are: C Ladenburger, 'Fundamental Rights and Citizenship of the Union' in G Amato, H Bribosia and B de Witte (eds), *Genesis and destiny of the European Constitution: Commentary on the Treaty Establishing a Constitution for Europe in the Light of the* Travaux Préparatoires *and Future Prospects* (Brussels, Bruylant, 2007) 347–50; J Ziller, 'Le fabuleux destin des *Explications relatives à la Charte des droits fondamentaux de l'Union européenne*' in G Cohen-Jonathan et al (eds), *Mélanges en l'Honneur de Jean Paul Jacqué* (Paris, Dalloz, 2010); JP Jacqué, 'The Explanations Relating to the Charter of Fundamental Rights of the European Union' in S Peers et al (eds), *The EU Charter of Fundamental Rights* (Oxford, Hart, 2014); and K Lenaerts and JA Gutiérrez-Fons (n 4) paras 237–38.

In this respect, one can trace three steps in the argument for granting them significant weight. First, primary law and the Explanations themselves implicitly ground the Explanations' authority in two bases:

1. Authorship and/or authentic interpretation: according to the Charter's preamble, the Explanations were 'prepared under the authority of the Praesidium of the Convention which drafted the Charter and updated under the responsibility of the Praesidium of the European Convention'.[15] Moreover, Article 52(7) CFR states that the Explanations were 'drawn up as a way of providing guidance in the interpretation of this Charter'.[16]
2. Reliable guide to the sources (and so drafting history) of the Charter: according to Article 6(1) TEU, the Explanations 'set out the sources of [the Charter's] provisions'.[17]

In the classic scheme of EU interpretation (literal, contextual (including *travaux préparatoires*)[18] and teleological) then, the Explanations would appear to fall into the latter two categories.[19]

Second, whilst Lenaerts and Gutiérrez-Fons understand most explanatory reports' authority as deriving from the contextual basis of interpretation (as a form of *travaux préparatoires*),[20] they contend that the Explanations' interpretative value 'exceeds that of *travaux préparatoires*'.[21] They appear to emphasise the teleological value of the Explanations as an indication of the drafters' intentions: 'one must not downplay [*rélativiser*] the fact that both the authors of the Treaty of Lisbon and those of the Charter insisted on their importance'.[22]

Third, in practice, where the CJEU has referred to the Explanations, it has tended to treat them as authoritative and determinative.[23] This is particularly

[15] This text is from the Charter preamble. The Explanations' preamble uses slightly different wording and clarifies that the updates were made 'in the light of the drafting adjustments made to the text of the Charter by [the European] Convention (notably to Articles 51 and 52) and of further developments of Union law'.

[16] Compare the preamble of the Explanations themselves, casting them as a 'valuable tool of interpretation intended to clarify the provisions of the Charter'.

[17] Strictly speaking, it is ambiguous whether the final phrase 'those provisions' refers back to *all* the 'rights, freedoms and principles in the Charter' or instead 'the general *provisions* in Title VII [Arts 51–54]' (emphasis added). Reading the paragraph systematically, however, it is probably intended to refer to the former. That fits with the fact that the 'due regard' requirement which immediately precedes this phrase clearly does refer to the whole Charter, as well as the fact that all of the Explanations purport to list the sources of the Charter rights; indeed, the Explanations to Arts 51 and 52 CFR are amongst the few that do not include a source for some provisions.

[18] See Lenaerts and Gutiérrez-Fons (n 4) ch 1, s II.

[19] But see ibid, para 114, suggesting that Arts 51 and 52 CFR constitute a sort of *lex specialis* of the Charter's interpretation.

[20] Lenaerts and Gutiérrez-Fons (n 4) para 49.

[21] ibid para 237 (my translation).

[22] ibid para 237 (my translation).

[23] eg, Case C-689/19 P *VodafoneZiggo Group v Commission* EU:C:2021:142, para 136; Case C-119/19 P *Commission and Council v Carreras Sequeros and others* EU:C:2020:676, paras 112–15; and Case C-129/14 PPU *Zoran Spasic* EU:C:2014:586, paras 54–55. But see the claim that 'in

so as to the source of a right.[24] That is, moreover, consistent with the Court's practice in respect of explanatory reports attached to international legal instruments.[25]

Significant 'regard' is 'due', on this view, because the Explanations are thought to provide a reliable map of the Charter's roots and solid stakes against which its drafters intended the budding rights to grow. But is this belief correct?

III. ARTICLE 3 CFR AND ITS EXPLANATIONS – CLARIFYING OR MISLEADING?

The right to integrity of the person is a useful test case for this theory of the Explanations. One of the Charter's chief architects described this Article as 'undoubtedly one of the newest and richest of the Charter'.[26] It is in particularly acute need of clarification, both because of its opacity and its potential importance. The Explanations appear to provide that clarification; however, as we shall see in this section, this clarity is at times misleading or illusory.

III.a. Article 3: Shape, Ambiguities and Importance

Article 3 provides:

> Right to the integrity of the person
>
> 1. Everyone has the right to respect for his or her physical and mental integrity.
> 2. In the fields of medicine and biology, the following must be respected in particular:
>
> (a) the free and informed consent of the person concerned, according to the procedures laid down by law;
>
> (b) the prohibition of eugenic practices, in particular those aiming at the selection of persons;

certain cases, the CJEU may have silently but knowingly distanced itself from what is prescribed in the *Explanations*': A Bailleux, 'Article 52-2. Portée et interprétation des droits et principes' in F Picod and S Van Drooghenbroeck (eds), *Charte des droits fondamentaux de l'Union européenne: Commentaire article par article* (Brussels, Bruylant, 2018), para 61 (my translation).

[24] Especially *Sequeros* (n 23); and see eg Case C-230/18 *PI v Landespolizeidirektion Tirol* EU:C:2019:383, para 53.

[25] See the case law cited in K Lenaerts and JA Gutiérrez-Fons (n 4) para 49 and also eg Case C-684/17 *Pillar Securitisation Sàrl v Hildur Arnadottir* EU:C:2019:345, para 47, Case C-268/17 *AY* EU:C:2018:602, para 59 and Case C-640/15 *Tomas Vilkas* EU:C:2017:39, paras 50–51. Cf the more nuanced position of AG Bobek in his Opinion in Case C-574/15 *Mauro Scialdone* EU:C:2017:553, paras 34–46, to which I will return below.

[26] G Braibant, *La Charte des droits fondamentaux: témoignage et commentaire* (Paris, Seuil, 2001) 94 (my translation). Others concur: eg S Hennette-Vauchez, 'Art II-63' in L Burgorgue-Larsen et al (eds), *Traité établissant une Constitution pour l'Europe. Partie II. La Charte des droits fondamentaux de l'Union* (Brussels, Bruylant, 2005) 53–54.

(c) the prohibition on making the human body and its parts as such a source of financial gain;
(d) the prohibition of the reproductive cloning of human beings.

The right to physical and mental integrity in Article 3(1) is not new in international human rights law,[27] and the Court of First Instance had already recognised a right to physical integrity as part of the general principles of Community law in 1992.[28] The 'newness and richness' of this Article is rather in its second paragraph. This sets out four bioethical provisions encompassed by Article 3(1): respect for informed consent and prohibitions on eugenic practices, commercialisation of the body and its parts, and reproductive cloning.[29] Their scope is limited to 'medicine and biology'; at the same time, the list is non-exhaustive.

This Article is potentially highly significant. At one level, as we shall see in more detail below, it is relevant to or even determinative of the legality of certain practices insofar as they fall within the scope of EU law, such as selling blood or particular reproductive activities. At a second level, Article 3 articulates non-exhaustive constitutional constraints in respect of the highly sensitive area of bioethics at the EU level. At a final level, there are strong arguments that Article 3 helps flesh out the concept of dignity contained in Article 1 CFR and Article 2 TEU.[30] In helping to articulate a European understanding of human dignity, this potentially provides a compass for the navigation of other future fundamental changes (such as the advent of artificial intelligence and the regulation of non-medical bodily implants).

Significance is not, however, the same as clarity. The Court of Justice has interpreted and applied this right in only three cases to date, in each case tersely: *Netherlands v Parliament and Council*,[31] where it rejected an annulment action

[27] See notably Article 5(1) of the American Convention on Human Rights 1969 (signed 22 November 1969, entered into force 18 July 1978) 1144 UNTS 144. It has also been read into Arts 3 and 8 ECHR: see the line of case law beginning with *X and Y v the Netherlands* [GC] Series A no 91 (1985) 8 EHRR 235, para 22.

[28] Joined Cases T-121/89 and T-13/90 *X v Commission* [1992] ECR II-02195, para 58. On appeal, the Court of Justice addressed the case instead under a different right (Case C-404/92 *X v Commission* [1994] ECR I-04737, paras 17 and 23), but did not overturn the CFI's judgment in respect of the physical integrity aspect. See also Case C-404/92 *X v Commission* [1994] ECR I-04737, Opinion of AG Van Gerven, paras 23–24 and 28.

[29] That is, the deliberate creation of a human being genetically identical to another human being (see Art 1 of the First Protocol to the Oviedo Convention). This is typically opposed to therapeutic cloning – the cloning of individual cells with a therapeutic aim. Cf International Bioethics Committee (IBC), *Report of IBC on Human Cloning and International Governance* (SHS/EST/CIB-16/09/CONF.503/2 Rev, 9 June 2009) para 30.

[30] N Coghlan, 'Health Union and Bioethical Union: Does Hippocrates Require Socrates?' (2020) 11(4) *European Journal of Risk Regulation* 766, 776; N Coghlan, 'One Fattened, Six Starved? The Article 2 TEU Values After the Rule of Law Conditionality Judgments' (*European Law Blog*, 15 March 2022) https://europeanlawblog.eu/2022/03/15/one-fattened-six-starved-the-article-2-teu-values-after-the-rule-of-law-conditionality-judgments/, accessed 22 March 2022; and Case T-1/17 *La Mafia Franchises SL v EUIPO* EU:T:2018:146, para 36.

[31] Case C-377/98 *Kingdom of the Netherlands v European Parliament and Council of the European Union* [2001] ECR I-07079, paras 70 and 78–80. Whilst the case was decided before

against the Biotechnology Directive which inter alia alleged violation of the right to informed consent; *TMD*,[32] where it interpreted the VAT exemption for the supply of human blood as not including supply for industrial purposes inter alia in light of the commercialisation prohibition; and *La Quadrature du Net*, where it clarified the limits of traffic and location data retention in light inter alia of possible positive obligations to combat crime against vulnerable individuals under Articles 3, 4 and 7 CFR.[33] In the absence of developed jurisprudence and despite two decades of scholarly debate,[34] much remains mysterious about Article 3(2). Amidst this mystery, the Explanations have appeared to provide much-needed elucidation of the roots and intended direction of growth of Article 3. They state as follows:

1. In its judgment of 9 October 2001 in Case C-377/98 *Netherlands v European Parliament and Council* [2001] ECR-I 7079, at grounds 70, 78 to 80, the Court of Justice confirmed that a fundamental right to human integrity is part of Union law and encompasses, in the context of medicine and biology, the free and informed consent of the donor and recipient.
2. The *principles of Article 3* of the Charter *are already included in the Convention on Human Rights and Biomedicine*, adopted by the Council of Europe (ETS 164 and additional protocol ETS 168). *The Charter does not set out to depart from those principles*, and therefore prohibits only reproductive cloning. It neither authorises nor prohibits other forms of cloning. Thus it does not in any way prevent the legislature from prohibiting other forms of cloning.

the Charter gained binding force, the rights that the Court recognised as general principles were unmistakably based on Art 3 CFR; compare the Opinion of AG Jacobs in the same case, [2001] ECR I-07084, para 197. See also paras 71–75 of the Judgment (holding that the contested directive adequately protected the non-commercialisation principle, derived however from human dignity rather than integrity).

[32] Case C-412/15 *TMD Gesellschaft für transfusionsmedizinische Dienste mbH v Finanzamt Kassel II – Hofgeismar* EU:C:2016:738, para 29.

[33] Joined Cases C-511/18, C-512/18 and C-520/18, *La Quadrature du Net and Others* EU:C:2020:79, paras 122, 126–28 and 145–46. See also, identically on this point, Case C-140/20 *Commissioner of An Garda Síochána* EU:C:2022:258, paras 48–49 and 95. The pending Case C-765/21 *DM v Azienda Ospedale-Università di Padova* may provide further clarification. The General Court case law is similarly scant: to *X v Commission* (n 28) and *Mafia* (n 30) one can perhaps add Joined Cases T-710/21, T-722/21 and T-723/21, *Roos v Parliament* EU:T:2022:262. In rejecting this challenge to the Parliament's access rules in the context of the COVID-19 pandemic, the Tribunal implied that Art 3 was not absolute (para 209) and held that restricting access to those who had undergone certain tests or vaccinations access did not affect the essence of that right (paras 130, 195–98 and 204–05). See also Case T-96/21 *Amort and others v Commission* EU:T:2021:804, para 36 (and many other Orders to the same effect).

[34] A selection of the English, French and Spanish literature: G Braibant (n 26) 93–100; B Mathieu, 'La Charte européenne des droits fondamentaux et la bioéthique' [2002] *Revue européenne de droit public* 841; S Hennette-Vauchez (n 26); M Nowak, 'Article 3. Right to the Integrity of the Person' in EU Network of Independent Experts on Fundamental Rights, *Commentary of the EU Charter of Fundamental Rights* (Brussels, European Commission, 2006) http://hdl.handle.net/2078.1/97727, accessed 8 December 2021; JM Sobrino Heredia, 'Artículo 3: Derecho a la integridad de la persona' in A Mangas Martín (ed), *Carta de los Derechos Fundamentales de la Unión Europea: Comentario artículo por artículo* (Bilbao, Fundación BBVA, 2008); M de C Barranco Avilés, 'Artículo 3. Derecho a la integridad de la persona' in C Monero Atienza and JL Monereo Pérez (eds), *La Europa de los*

3. The *reference to eugenic practices, in particular those aiming at the selection of persons, relates to possible situations in which selection programmes are organised and implemented, involving campaigns for sterilisation, forced pregnancy, compulsory ethnic marriage among others, all acts deemed to be international crimes in the Statute of the International Criminal Court* adopted in Rome on 17 July 1998 (see its Article 7(1)(g)).[35]

These lines have greatly influenced the debate to date. In this section, I will critically analyse the clarity they appear to provide in three important debates as to Article 3: whether it contains rights, principles or a mixture (III.b); the origin and scope of the eugenics prohibition (III.c); and the origin and scope of the commercialisation prohibition (III.d).

III.b. Rights, Principles or Both?

In this first example, the Explanations are misleading and contradict the wording of Article 3 itself, as the *travaux préparatoires* make clear.

The Charter contains rights and principles. According to Article 52(5) CFR, 'principles' require implementation by the national or EU legislature or executive acts. Accordingly, principles 'shall be judicially cognisable only in the interpretation of such acts and in the ruling on their legality'. Conversely, 'rights' are subjective and are invokable as such: they must be 'respect[ed]' rather than merely 'observe[d]' (Article 51(1) CFR). Categorisation as a right or principle is therefore of 'great relevance' to the normative effect of a Charter provision.[36] The criteria for classifying Charter provisions as rights or principles remain unclear and contested.[37] One relevant element is thought to be the drafters' intention as revealed by the wording of the rights or by the Explanations'

derechos: estudios sistématico de la Carta de los Derechos Fundamentales de la Unión Europea (Madrid, Centro de Estudios Políticos y Constitucionales, 2012); J Jones, 'Human Dignity in the EU Charter of Fundamental Rights and its Interpretation before the European Court of Justice' (2012) 33 *Liverpool Law Review* 281; S Michalowski, 'Article 3' in S Peers et al (eds), *The EU Charter of Fundamental Rights: A Commentary* (Oxford, Hart, 2014); F Vanneste, 'Article 3. Droit à l'intégrité de la personne' in Picod and Van Drooghenbroeck (n 23); S Heselhaus, 'Human Dignity in the EU' in P Becchi and K Mathis (eds), *Handbook of Human Dignity in Europe* (Cham, Springer, 2019); T Lock, 'Article 3 CFR' in M Kellerbauer, M Kalmert and J Tomkin (eds), *The EU Treaties and the Charter of Fundamental Rights: A commentary* (Oxford, Oxford University Press, 2019); R Yotova, 'Regulating Genome Editing under International Human Rights Law' (2020) 69 *ICLQ* 653; and M Fartunova-Michel and B Nabli, *Droit de l'Union européenne de la bioéthique* (Brussels, Bruylant, 2021) esp paras 78 and 111–57.

[35] Explanations relating to the Charter of Fundamental Rights [2007] OJ C303/17, 18 (emphasis added).

[36] T Lock, 'Rights and Principles in the EU Charter of Fundamental Rights' (2019) 56(5) *CML Rev* 1201, 1225–26.

[37] See eg Lock (ibid), Bailleux (n 23) paras 35–37, and R Tinière et al, 'Droits Fondamentaux' [2019] *Annuaire de droit de l'Union européenne* 395, 398–401.

classification or wording.[38] For some, the Explanations' simple use of the word 'principles', as in the case of Article 35 (health care), is decisive.[39]

Whilst scholars have almost entirely ignored the classification of Article 3,[40] two actors in legal practice – Thomas de la Mare QC and the UK government – have independently argued that Article 3(1) contains a right, whereas Article 3(2) contains principles.[41] Both rely solely on the drafters' intention as revealed by the Explanations' reference to 'the principles of Article 3'.

To see why this is mistaken, one needs to return to the Charter Convention itself. On 8 March 2000, the Praesidium of the Charter Convention circulated a set of draft articles.[42] This included the draft Article 3 in a form close to the final one (see the Annex, which shows the subsequent evolution of this Article). Its Article 3(2) referred to the four provisions as 'principles', as did the accompanying 'Statement of Reasons' that would later evolve into its Explanations. Importantly, this wording was included two months before a clear legal distinction between 'rights' and 'principles' was articulated on 16 May.[43] Even then, that distinction was limited to *social* rights and would not have extended to Article 3. At this stage, then, the word 'principles' in Article 3 and its Explanations was inert.

By July 2000, the rights/principles distinction was reduced to a faint echo.[44] Yet it remained present, and it now applied to the entire Charter. In that context,

[38] eg Lock (n 36) 1218–19; and notably Case C-356/12 *Wolfgang Glatzel v Freistaat Bayern* EU:C:2014:350, para 74.

[39] Lock (n 36) 1215. Note that this is different from relying on the Explanations to Art 52(5) which expressly categorise certain provisions as rights, principles or a mixture. Nevertheless, even that categorisation was carried out under Vitorino's responsibility during the Second Convention, not the original Charter Convention. It is not clear, then, that it should be authoritative: compare Bailleux (n 23) para 37, and see also n 48 below.

[40] Heselhaus (n 34) 957 is a rare exception to this, contending on the basis of its wording that Art 3(2)(a) (informed consent) contains a right.

[41] T de la Mare QC, *Advice in the Matter of Mitochondrial DNA transfer* (19 February 2015, on file with the author), para 32; Department for Exiting the European Union (DExEU), *Charter of Fundamental Rights of the European Union: Right by Right Analysis* (5 December 2017) www.assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/664891/05122017_Charter_Analysis_FINAL_VERSION.pdf, accessed 22 September 2021, 19.

[42] Praesidium of the Charter Convention, 'New Proposal for Articles 1 to 12 (now 1 to 16)' (8 March 2000) CHARTE 4149/00.

[43] Praesidium of the Charter Convention, 'New Proposal for the Articles on Economic and Social Rights and for the Horizontal Clauses' (16 May 2000) CHARTE 4316/00, draft Article 31. But note that this question was on the agenda from the beginning: eg Praesidium, 'Draft List of Fundamental Rights' (27 January 2000) CHARTE 4112/2/00 REV 2, 7.

[44] Praesidium of the Charter Convention, 'Complete Text of the Charter Proposed by the Praesidium' (28 July 2000) CHARTE 4422/00, Art 49(1): 'respect the rights, observe the principles'. The faintness of this distinction is evident from late amendments by Rodríguez Bereijo (for the Spanish executive), Goldsmith (for the UK executive) and O'Kennedy (for the Irish executive), amongst others, seeking unsuccessfully to make it clearer: Praesidium of the Charter Convention, 'Observations Recues Relatives au Document CHARTE 4422/00 Convent 45' (7 September 2000) (included in Coghlan and Steiert (n 1) 3125–3546), 3150, 3267–68 and 3460–61, respectively. These failed, though

António Vitorino submitted an amendment to Article 3. Vitorino was the representative of the Commission in the Charter Convention and the Praesidium, and later a crucial player in the upgrading of the Explanations' status during the Second Convention. According to this amendment, now that the Charter established

> a clear distinction between rights and principles … the Commission considers that, for reasons of drafting coherence, it is appropriate to clearly distinguish between subjective rights and objective principles from now on … and consequently to avoid the word 'principles' where one in fact aims at [*là où on vise en réalité des*] subjective rights.[45]

On this basis, Vitorino and the Commission proposed removing the word 'principles' from Article 3(2). The following draft did so, wording that remains today.[46]

For unclear reasons, the Charter Convention's Secretariat failed to amend the Explanations' language in line with this.[47] The Second Convention's Secretariat also overlooked this when sweeping up 'purely colloquial' uses of the word 'principle' from the Explanations during the Second Convention.[48] But this omission to amend the non-binding Explanations cannot be a better guide to the drafters' intentions than the Charter Convention's decision to amend the Charter article itself.[49]

Contrary to what the Explanations imply, then, the drafters understood and intended Article 3 to consist wholly of rights. Whether Article 3 *does* consist of rights depends on the theory the CJEU ultimately adopts as to

the preamble was amended to refer to 'rights, freedoms and principles' rather than just 'rights and freedoms': Charter of Fundamental Rights of the European Union [2000] OJ C364/1, preamble and Art 51(1).

[45] Praesidium, 'Observations Recues' (n 44) 3530 (my translation).

[46] Praesidium of the Charter Convention, 'Complete text of the Charter proposed by the Praesidium following the meeting held from 11 to 13 September 2000 and based on CHARTE 4422/00 CONVENT 45' (14 September 2000) CHARTE 4470/00, and see also the Annex to this chapter.

[47] Note that in the penultimate version of the Explanations (Praesidium of the Charter Convention, 'Text of the explanations relating to the complete text of the Charter as set out in CHARTE 4470/00 CONVENT 47 + COR 1' (20 September 2000) CHARTE 4471/00), there is a drafting error in the text of Art 3 itself: the other amendments made in ibid are included, but the word 'principles' wrongly remains in Art 3(2). This might be part of the explanation, as it were, for the omission.

[48] See the Second Convention document 'Consultation on the updated and consolidated version of the Explanations on the Charter' (3 June 2003) WG II–WD 27 (available in Coghlan and Steiert (n 1)) 3–4. This document emphasises that it did not seek to categorise provisions as rights or principles; rather, it aimed to 'respect the spirit of the Charter Convention, confirmed by our Working Group, that the character as a right of a principle of individual articles is expressed as clearly as possible in the wording of the respective articles'. See further C Ladenburger, 'European Union Institutional Report' in J Laffranque, *Protection of Fundamental Rights Post-Lisbon, Reports of the XXV FIDE Congress* (Tallinn, Tartu University Press, 2012), 184: Art 3 is one of two '[u]nfortunat[e] … cases of doubt' left in the Explanations after this 'terminological cleansing').

[49] This point is made still clearer by the point in the previous footnote and by the history of the Explanations: see section IV below.

the rights/principles distinction.[50] But insofar as intention is relevant, the Explanations are misleading. More broadly, this should give scholars pause for thought in treating the Explanations' use of the word 'principle' in respect of other articles, such as Article 35 (healthcare), as decisive.[51]

III.c. The Origin and Scope of the Eugenics Prohibition: The Bridge to Oviedo and to Rome?

In this second example, the Explanations are misleading as to the origin of a provision and of far less assistance as to its scope than they first appear.

The prohibition on 'eugenic practices' (Article 3(2)(b)) is perhaps the most controversial and consequential of Article 3's provisions. This fits into broader debates as to the position of international human rights law on practices such as human genome editing.[52] Are 'eugenic practices' confined to organised and/or coercive practices which infringe individual reproductive liberty or are they grounded in the historical ideology of eugenics? Or do they also include certain individual practices, such as heritable human genome editing (HHGE),[53] prenatal or preimplantation diagnosis[54] or mitochondrial

[50] Incidentally, other factors point towards Art 3(2) containing rights: (i) the provisions are mandatory, unconditional and do not refer to expression in EU or national law (compare Joined Cases C-569/16 and C-570/16 *Bauer* EU:C:2018:871, paras 84–85); (ii) contextually, every other provision in the Dignity Title appears to consist entirely of rights; (iii) Art 3(2) fleshes out Art 3(1) (compare *Netherlands v Parliament and Council* (n 31) para 78), and it is difficult to see how a subjective right could partly consist of objective principles; and (iv) in *TMD* (n 32) the Court interpreted the Sixth VAT Directive in the light of Art 3(2)(c); yet nothing in that Directive suggests that it was intended to implement Art 3(2) CFR, implying that the latter could only be relevant to interpretation as a right.

[51] See n 39. See also S Peers and S Prechal, 'Article 52 – Scope of Guaranteed Rights' in Peers et al (n 34) para 52.166.

[52] See generally N Coghlan, 'Heritable Human Genome Editing: The Bioethical Battle for the Basis and Future of Human Rights' *Implications philosophiques* (2022) www.implications-philosophiques.org/heritable-human-genome-editing-the-bioethical-battle-for-the-basis-and-future-of-human-rights/, accessed 22 March 2022.

[53] HHGE alters the DNA of the germline (reproductive) cells, whether directly (editing of a spermatozoa or ovum) or indirectly (early-stage editing of all of an embryo's cells). Three provisions of EU secondary law prohibit or exclude HHGE: Directive 98/44/EC of 6 July 1998 on the legal protection of biotechnological inventions [1998] OJ L213/13, Art 6(1)(b); Regulation (EU) 536/2014 on clinical trials on medicinal products for human use, and repealing Directive 2001/20/EC [2014] OJ L158/1, Art 90; and Regulation (EU) 2021/695 of 28 April 2021 establishing Horizon Europe – the Framework Programme for Research and Innovation, laying down its rules for participation and dissemination, and repealing Regulations (EU) No 1290/2013 and (EU) No 1291/2013 [2021] OJ L 170/1, Art 18(1)(b).

[54] Prenatal diagnosis involves testing a foetus for genetic conditions. This can, among other things, inform decisions as to whether or not to abort. Preimplantation genetic testing involves testing embryos for particular genetic conditions, typically to inform which embryo(s) to implant. See generally paras 1.36–1.41 of Nuffield Council on Bioethics, *Genome Editing and Human Reproduction* (July 2018). See also Regulation (EU) 2017/746 of 5 April 2017 on in vitro diagnostic medical devices and repealing Directive 98/79/EC and Commission Decision 2010/227/EU [2017] OJ L117/176, Art 4 (IVDMD Regulation) and N Coghlan, 'If the EU Picks Baby Genes' (*VerfBlog* 26 April 2023) https://verfassungsblog.de/if-the-eu-picks-baby-genes/, accessed 22 June 2023.

replacement therapy?[55] If so, are such practices always eugenic, or only where there is a particular aim (such as enhancing intelligence rather than curing a serious single-gene disorder)? The wording of Article 3(2)(b) provides little assistance.[56]

In this context, the Explanations' references to the Oviedo Convention (Oviedo) and to the Rome Statute (Rome) have profoundly influenced the debate as to the origins and scope of this provision. Article 3 is said to 'mainstream' existing international biolaw into general human rights law[57] or to be inspired by the Rome Statute.[58] For some of the most influential commentators, the war crimes set out in Article 7(1)(g) of the Rome Statute provide the starting point for Article 3(2)(b)'s interpretation.[59] That starting point conditions what other activities might fall within Article 3(2)(b): for Nowak, organised coercive campaigns by non-state actors may do so; for Heselhaus, the activity must pass a similar threshold of seriousness. One scholar goes further, arguing that Article 3(2)(b) incorporates relevant international criminal case law.[60] Others have placed more weight on the reference to the Oviedo Convention, concluding, for instance, that HHGE, sex selection and/or human enhancement would constitute eugenics in light of Articles 13 and 14 of that Convention.[61]

[55] For our purposes, it suffices to note that some argue that this technique amounts to HHGE. This was one argument against permitting the therapy in the UK, leading to a public legal dispute on the scope of the eugenics prohibition under EU law: amongst others, de la Mare QC (n 41) and Lord Brennan QC and A Henderson, *Legal Opinion: Addendum* dated 16 February 2015 (on file with the author).

[56] As Michalowski (n 34) para 03.33 puts it, it is unclear what 'concept of eugenics' it adopts. Note that there is a separate question – almost entirely ignored by scholars – as to whether these various activities in fact fall within the scope of EU law such that the Charter applies (Art 51(1) CFR). That question is not relevant to the present analysis (which concerns the sources and intended scope of the Charter prohibition in the abstract) but would likely, as EU law currently stands, severely limit the actual bite of that prohibition.

[57] Fartunova-Michel and Nabli (n 34) para 111, and see also Michalowski (n 34) para 03.14 and Ladenburger (n48) 143. More broadly, see Hennette-Vauchez (n 34) 54; Mathieu (n 34) 842; and Sobrino Heredia (n 34) 149.

[58] De la Mare (n 41) para 33.1.

[59] Nowak (n 34) 39–40; Sobrino Herida (n 34) 153–54; Michalowski (n 34) paras 03.32–03.33; Heselhaus (n 34) 958; Yotova (n 34) 674; implicitly Lock (n 34) 2104; and Fartunova-Michel and Nabli (n 34) para 114. See also de la Mare (n 41) paras 33 and 36 and, confusing the Explanations with the case law, A Nordberg and L Antunes, *Genome Editing in Humans* PE729.506 (Brussels, EPRS 2022) 29–30. Of these, only Nowak acknowledges that Art 7(1)(g) is in fact limited to acts committed 'as part of a widespread or systematic attack directed against any civilian population', something that would rather restrict the relevance of this Charter prohibition given the scope of EU law and the additional 'fields of medicine and biology' limit. That is not a fatal objection (compare Art 2(2) CFR and see also J Meyer and M Engels, *The Charter of Fundamental Rights of the European Union and the Work of the Convention: A Collection of Documents*, 2nd edn (Berlin, Bundestag, 2002) 13–14) but it cautions against this view.

[60] Jones (n 34) 288.

[61] Art 13 reads: 'Interventions on the human genome: An intervention seeking to modify the human genome may only be undertaken for preventive, diagnostic or therapeutic purposes and only if its aim is not to introduce any modification in the genome of any descendants.' Art 14 reads: 'Non-selection of sex: The use of techniques of medically assisted procreation shall not be allowed

Two points arise here. First, Article 3(2)(b) was almost entirely based on French law, not the Rome Statute or Oviedo Convention. Second, the drafters appear to have intended for it to be left deliberately vague and wide; in particular, there is little ground for reading it as incorporating or subject to the limitations of those two separate instruments.

III.c.i. Origin

The first thing to notice[62] is that Article 3(2)(b)'s wording is very close to that of French law:

> Article 3(2)(b) CFR: '… l'interdiction des pratiques eugéniques, notamment celles qui ont pour but la sélection des personnes …'
>
> Article 16-4 alinéa 2 du Code civil: 'Toute pratique eugénique tendant à l'organisation de la sélection des personnes est interdite'.

Conversely, neither the Rome Statute nor the Oviedo Convention mentions eugenics.

This is not a coincidence. First, bioethics were on the agenda because the 1990s were a decade of European preoccupation with bioethical challenges – understood in human rights terms – not because of Oviedo. Every one of the major reports and declarations seeking an EU Charter of Rights in the previous decade (1990,[63] 1996,[64] 1997,[65] 1998[66] and 1999[67]) called for the inclusion of bioethical rights. The very first list of rights proposed by the Praesidium in January 2000 included 'questions of bioethics'; these were the only words in the entire list for which no existing legal source was cited.[68] Oviedo only entered the debate subsequently.[69]

for the purpose of choosing a future child's sex, except where serious hereditary sex-related disease is to be avoided.' See Sobrino Herida (n 34) 153–54; Vanneste (n 34) 95–98; and see also Brennan QC and Henderson (n 55) paras 8–12. cf de la Mare (n 41) para 33.

[62] As others have before: eg Hennette-Vauchez (n 34) 58 and, rather understatedly, Braibant (n 26) 98.

[63] A Cassese et al, *1992 – What Are Our Rights? Agenda for a Human Rights Action Plan* (Florence, EUI, 1992), 7 and 42–46.

[64] Comité des Sages, *For a Europe of Civic and Social Rights* (Brussels, Office for Official Publications of the EC 1996) 41.

[65] *Déclaration pour une Europe civique et sociale du 27 mars 1997 (Le Monde 10.06.97)*, included in Praesidium of the Charter Convention, 'Contribution de CAFECS en vue de l'audition publique du 27 avril 2000' (25 April 2000) CHARTE 4241/00, 50.

[66] A Cassese et al, *Leading by Example – A Human Rights Agenda for the European Union for the Year 2000* (Florence, EUI, 1998) para 17.

[67] Expert Group on Fundamental Rights, *Affirming Fundamental Rights in the European Union: Time to Act* (Brussels, Office for Official Publications of the EC 1999) 24–25. See also the European Parliament's Working Document on the Convention (December 1999) PE 232.397, 6.

[68] Praesidium, CHARTE 4112/1/00 REV 2 (n 43) 3. See also the initial version (CHARTE 4112/00) dated 26 January.

[69] In Praesidium of the Charter Convention, 'Contribution de M Guy Braibant, Représentant personnel de la France' (7 February 2000) CHARTE 4121/00, 3–4.

Second, the inclusion and wording of Article 3(2)(b) primarily resulted from French law and the actions of Guy Braibant, Praesidium member and the representative of the French Prime Minister and President.[70] The Praesidium's February 2000 draft articles included, as part of a right to integrity, seven principles derived from Oviedo. These included verbatim the prohibition on HHGE found in Article 13 Oviedo.[71] This sparked extensive debate, opposition and alternative proposals.[72]

Braibant then struck decisively. He argued for the inclusion of a shorter list of basic principles including 'a ban on "eugenic practices" (Article 16 of the French Civil Code, as a result of a 1994 law)'.[73] At his invitation, a part of the Praesidium visited Paris for a working lunch with the French Minister for European Affairs on 7 March. Over 'splendid cuisine [and] excellent *Puligny-Montrachet*' at the Quai d'Orsay, the draft Charter was revised and re-drafted.[74] The following day, the Praesidium issued a fresh draft whose Article 3 was close to that in force today (see the Annex) and which included a 'prohibition of eugenic practices'.[75]

The phrase 'in particular those aiming at the selection of persons' was added later. It stemmed from a report by the European Group on Ethics in Science and New Technologies (EGE) which stated that it 'only propose[d] more precise wording, which is inspired by the French law on bioethics of 1994'.[76]

[70] On Braibant's place in the Praesidium, see Coghlan and Steiert (n 1) 17–18 and sources cited. Braibant had led the drafting of the first Conseil d'État report on bioethics twelve years before: Conseil d'État, *Sciences de la vie, de l'éthique au droit* (Paris, La Documentation française 1988).

[71] Praesidium of the Charter Convention, 'Draft Articles' (15 February 2000) CHARTE 4123/1/00 REV 1.

[72] Generally Praesidium of the Charter Convention, 'Declaration of the Association of Women of Southern Europe (AFEM)' (28 February 2000) CHARTE 4120/00 ADD1, 'Observations sur CHARTE 4123/1/00 REV1 de M Guy Braibant (Représentant personnel du Gouvernement de la France' (21 February 2000) CHARTE 4135/00, 'Due lettere di l'On Elena Paciotti (MPE) al Presidium' (28 February 2000) CHARTE 4138/00, 'Contribution submitted by Lord Goldsmith, Personal Representative of the Government of the United Kingdom' (6 March 2000) CHARTE 4146/00 and 'Anmerkungen der deutschen Länder zur Aufzeichnung des Präsidiums' (7 March 2000) CHARTE 4150/00.

[73] Praesidium, CHARTE 4135/00 (n 72) 3–4. Braibant may have been the origin of this phrase in French law too: his 1988 draft biolaw included a prohibition on embryo research capable of leading to 'des pratiques eugéniques'. G Braibant, *Avant-projet de loi sur les sciences de la vie et les droits de l'homme* (Paris, Conseil d'État 1988), 61.

[74] Praesidium of the Charter Convention, 'Fourth Meeting of the Praesidium, Paris, 7 March 2000 – Outcome of Proceedings' (31 March 2000) CHARTE 4210/00 and 'Fifth Meeting of the Praesidium, Brussels, 20 March 2000 – Outcome of Proceedings' (31 March 2000) CHARTE 4211/00. The quotation is from I Méndez de Vigo, *El rompecabezas: Así redactamos la Constitución Europea* (Barcelona, Biblioteca Nueva, 2005), 93 (my translation).

[75] Praesidium CHARTE 4149/00 (n 42) 4.

[76] Praesidium of the Charter Convention, 'Report submitted by the European Group on Ethics in Science and New Technologies (GEE), as requested by President Prodi' (15 June 2000) CHARTE 4370/00, 20–21. According to Praesidium of the Charter Convention, 'Projet d'articles 1 à 30 (doc CHARTE 4284/00 CONVENT 28) = Propositions d'amendements de compromise présentés par le Présidium' (4 June 2000) CHARTE 4333/00, 1, the language that was subsequently inserted was based on the amendments to similar effect numbered numbered 49 (Rodotà, Paciotti and Manzella (Rodotà being an EGE member)), 64 (Vitorino) and 67 (Berès). Those amendments

In fact, Oviedo was relevant to Article 3(2)(b)'s origin and wording in only two ways. First, the limitation of all Article 3(2) provisions to the 'fields of medicine and biology' derives from Oviedo.[77] Second, the Oviedo Convention's existence played an important role from the 8 March 2000 draft onwards in *legitimating* Article 3. Even that draft claimed that '[t]hese principles are set out in the [Oviedo] Convention'. This allowed the Charter Convention, caught between its ostensible role in merely codifying existing rights and its authority and incentives to innovate, to introduce these rights whilst plausibly casting them as mere codification.[78]

Scholars and practitioners have been misled, then, by the Explanations' implied account of the source of the eugenics prohibition.

III.c.ii. Intention

Nevertheless, perhaps the Explanations show that the drafters *intended* for the eugenics prohibition to be interpreted in the light of Oviedo and/or Article 7(1)(g) of the Rome Statute.

There are two problems with this view. First, the bridge the Explanations erect between Article 3(2)(b) and those instruments is unusually shaky. They do not claim that the right 'corresponds to' (Article 5), 'is' (Article 4), 'has been based on' (Article 8), 'also draws upon' (Article 15), 'has the same meaning and scope' (Article 19), 'is fully in line with … and does not create any new right' (Article 36) or 'reproduces' (Article 41) any part of Oviedo or Rome. They simply state that the principles 'are already included' in Oviedo and that the Charter does not 'set out to depart' from those. The link to Rome is still weaker: eugenic practices 'relates to possible situations in which selection programmes are organised and implemented', and this *includes* acts such as sterilisation, those acts *in turn* being international crimes. Other language versions are even clearer that the list of acts is non-exhaustive.[79] This looseness resolves, perhaps, the apparent self-contradiction in the Explanations (which superficially anchor Article 3(2)(b) to two separate international instruments which have little if any overlap).[80]

are contained in Praesidium of the Charter Convention, 'Amendments Submitted by the Members of the Convention Regarding Civil and Political Rights and Citizens' Rights' (25 May 2000) CHARTE 4332/00.

[77] eg from Art 1 Oviedo and indeed its title ('with regard to the application of biology and medicine'). See Praesidium, CHARTE 4123/1/00 REV 1 (n 71) 3–4, introducing this wording.

[78] See text at n 8.

[79] eg French: '*comportant* par exemple *des campagnes de stérilisation, de grossesses forcées, de mariages ethniques obligatoires* …' (ellipsis original, emphasis added); Spanish: 'que incluyesen, por ejemplo, *campañas de esterilización, embarazos forzados, matrimonios obligatorios según criterios étnicos, etc*' (emphasis added).

[80] Note that much commentary consists of fruitless attempts to reconcile these, of which Vanneste (n 34) is a particularly valiant example.

Second, we again risk being distracted from the wording and drafting history of Article 3(2)(b), dazzled by the superficial clarity of the non-binding Explanations. As shown above, the drafters deliberately chose the wide term 'eugenic practices' in place of the earlier proposal to include Oviedo's HHGE prohibition.

The EGE's report in May led to the only significant change to this wording. That report proposed narrowing the provision to practices 'aimed at organising the selection and the instrumentalisation of persons'.[81] Its report acknowledged the vagueness of the term 'eugenics' but proposed that at least two eugenic practices should be condemned: (i) forced sterilisation, forced pregnancies and so on, which were international crimes under the Rome Statute; and (ii) human germline genome editing which aimed to enhance rather than to cure. It stated that particular individual practices, namely preimplantation or prenatal diagnosis to 'avoid the birth of a disabled child', were not eugenics, but suggested that choosing sex might be.

Following this report, the drafters chose to add wording that was wider than the EGE's proposal in two respects: first, it omitted the word 'organising'; second, it added the words 'in particular' beforehand, thereby making it non-exhaustive. In doing this, the Praesidium ignored several amendments clarifying how the prohibition applied to genetic manipulation, including by readopting the wording of Article 13 Oviedo.[82] Despite persistent criticism of the final formulation's vagueness, the Praesidium resisted further changes (save for removing the word 'instrumentalisation').[83] Given this history, Braibant's post-Charter Convention writing probably best capture the drafters' aim: 'The term "in particular" allows one nevertheless to give a certain flexibility to the aims of the prohibition.'[84]

There is one counterargument to this 'deliberate flexibility' view. The 20 September 2000 draft of the Explanations added, for the first time, the reference to the Rome Statute.[85] This wording was lifted almost verbatim from the EGE's report, which was the only previous document in the entire *travaux préparatoires* to mention the Rome Statute in connection with eugenics. Perhaps, then, the Explanations' wording embodied a last-minute compromise specifically struck by the Charter Convention with the aim of clarifying and restricting

[81] Praesidium, CHARTE 4370/00(n 76) 21–22.
[82] Praesidium, CHARTE 4332/00 (n 76).
[83] See the summer amendments (Praesidium, 'Observations Recues' (n 44) 3192 (Bowness), 3269–70 (Goldsmith), 3353 (Korthals Altes), 3513 (Tarschys). On 'instrumentalisation', see Praesidium, CHARTE 4422/00 (n 44), Braibant (n 26) 98 and Meyer and Engels (n 59) 396–97.
[84] Braibant (n 26) 98.
[85] Praesidium, CHARTE 4471/00 (n 47).

the prohibition.[86] Even if this is the case,[87] however, two things remain true. First, the inserted text was, as explained above, vague and explicitly non-exhaustive. This contrasts with the clear and absolute wording added in the same draft to make clear that the Charter was neutral as to therapeutic cloning.[88] At most it would show an intention to limit Article 3(2)(b) to situations involving organised selection programmes, reflecting French law and the EGE report's approach. But the EGE itself understood such a limit to *include* certain individual practices, notably HHGE for enhancement purposes and possibly sex selection. Second, even this approach would be difficult to reconcile with the actual wording of Article 3(2), which still omitted the word 'organising' and was still non-exhaustive.

On close inspection, then, the clarity that the Explanations appear to provide as to the origins and intended scope of the eugenics prohibition is a mirage. The prohibition reflects French law and appears to have been drafted in a deliberately open and flexible way; even taken at its highest, the Explanations' limitation to 'organised' selection programmes would leave space for certain individual practices to be included. The link to Oviedo and Rome is loose and crossing those bridges obscures more than it clarifies.

III.d. The Origin and Scope of the Commercialisation Prohibition

In this third example, the Explanations are accurate as to the origin and intended anchoring of the provision, but that anchoring reveals less than it appears.

The interpretation of the prohibition on making the human body or its parts, as such, a source of financial gain has important implications. At present, EU secondary law only prohibits organ donors from receiving compensation.[89] Whilst Member States must encourage unpaid donation in respect of blood, tissue and cells donation and EU law imposes other limits, secondary law does not at present prohibit payment for such donation.[90] After some oscillation, the

[86] On the use and weight of such compromises, see section IV.

[87] It is equally possible that the wording was added by the Secretariat to provide stronger legal cover for the eugenics prohibition. Compare the amendment made to Art 5, one of the only other amendments in this draft.

[88] Ladenburger (n 14) 350 states that this wording embodied a specific Charter Convention compromise.

[89] Directive 2010/45/EU of 7 July 2010 on standards of quality and safety of human organs intended for transplantation [2010] OJ L207/14, Art 13.

[90] Directive 2002/98/EC of 27 January 2003 setting standards of quality and safety for the collection, testing, processing, storage and distribution of human blood and blood components and amending Directive 2001/83/EC [2003] OJ L 33/30, Art 20(1); Directive 2004/23/EC of 31 March 2004 on setting standards of quality and safety for the donation, procurement, testing, processing,

Commission appears to have decided that the Charter requires more. Its 2022 reform proposal would prohibit 'financial incentives or inducements' in respect of all such donors, whilst permitting 'compensation or reimbursement … for losses'.[91] Yet the former prohibition would be 'in accordance with national legislation', and Member States would have considerable discretion to set the conditions and limits of the latter.[92] Is the distinction between 'financial incentives or inducements' and 'compensation or reimbursement' compatible with the Charter prohibition?[93] And what degree, if any, of national discretion as to these two sets of concepts does the Charter allow?

Following the Explanations, scholars frequently interpret Article 3(2)(c) in the light of Article 21 Oviedo and the relevant paragraphs of that Convention's own Explanatory Report.[94] On that basis, some argue that blood and tissues, but not hair and nails, fall within its scope.[95] Article 21 Oviedo read with its Explanatory Report and/or Article 21 of the Second Additional Protocol to Oviedo are also taken to clarify that Article 3(2)(c) does not cover the payment of a donor's reasonable costs or compensation for the exercise of skilled work on a human body part.[96]

The Explanations are mostly accurate as to the origin of this provision. Whilst the 8 March 2000 draft blended French law and Oviedo,[97] the drafting was progressively purged of French contamination, ultimately falling entirely in line with Article 21 Oviedo.[98] The principle's original inclusion was no doubt

preservation, storage and distribution of human tissues and cells [2004] OJ L102/48, Art 12(1). For some of the other limits imposed by EU law, see Case C-421/09 *Humanplasma* [2010] ECR I-12869 and Case C-296/15 *Medisanus* EU:C:2017:431.

[91] Commission, 'Proposal for a Regulation … on standards of quality and safety for substances of human origin intended for human application and repealing Directives 2002/98/EC and 2004/23/EC' COM(2022) 338 final, 3, 12, recital 18 and Art 54.

[92] ibid 3 and Art 54; cf 12 and recital 18. This appears to be an attempt to reconcile the Commission's own ambivalence as to how far Art 3(2)(b) CFR constrains Member State discretion: contrast Commission, 'Commission Staff Working Document: Evaluation of the Union Legislation on Blood, Tissues and Cells' SWD(2019) 375 final, 66 and 163 with Commission, 'Inception Impact Assessment: Revision of the Union Legislation on Blood, Tissues and Cells' Ares(2020)6649649, 2–4.

[93] The Court appears open to this distinction: see *Humanplasma* (n 90). See also SWD(2019) 375 final (n 92) 163. Contrast Fartunova-Michel and Nabli (n 34) para 115.

[94] Art 21 Oviedo's wording is almost identical to Art 3(2)(c) CFR. The former reads: 'The human body and its parts shall not, as such, give rise to financial gain.'

[95] eg Lock (n 34) 2104. It is clear that blood does fall within the prohibition: *TMD* (n 33) para 29.

[96] Vanneste (n 34) para 23. Hennette-Vauchez (n 34) 59–60 and Nowak (n 34) 40 rely on Art 21 of the second Additional Protocol to the Oviedo Convention ('Additional Protocol … concerning Transplantation of Organs and Tissues of Human Organs') (adopted 24 January 2002) CETS No 186.

[97] Praesidium, CHARTE 4149/00 (n 42); see Arts 16-1 and 16-5 Code civil (which uses the word 'products' rather than 'parts' and does not include the phrase 'as such'). At the same time, for instance, the wording 'source of financial gain' derives from Art 21 Oviedo Convention, not French law.

[98] See the Annex.

inspired in part by French law, then, but the wording and legitimation came to be based entirely in Oviedo.[99] Unlike the eugenics prohibition, then, the wording (and drafting history) of this prohibition provide strong arguments for interpreting it in harmony with Article 21 Oviedo.

What is more delicate is intention. Did the drafters intend for Article 3(2)(c) CFR to incorporate by reference all of the caveats, limits and details included not in the Oviedo Convention itself, but in that Convention's own Explanatory Report? Council of Europe explanatory reports are not authentic interpretations and the European Court of Human Rights (ECtHR), which has jurisdiction to interpret the Oviedo Convention, feels free to depart from them.[100] The envisaged bridge from Article 3(2)(c) to the Explanatory Report is thus long and rickety: Charter provision (binding) > Explanations (persuasive) > referenced Convention (binding on some Member States) > that Convention's Explanatory Report (persuasive).[101]

In this sense, Sobrino Heredia's analysis is intriguing. He argues that the Explanations fail to clarify Article 3(2)(c) at all: Oviedo adds nothing because of its identical wording, and whilst Article 21 of the Second Additional Protocol does add detail, this is not cited by the Explanations.[102]

In practice, these doubts may prove purely theoretical. In interpreting Oviedo, the ECtHR is unlikely to depart from principles enunciated in both the Explanatory Report and a hard-law Protocol. The EU has historically tended to follow the Council of Europe's lead on non-commercialisation[103] and EU

[99] As Braibant himself acknowledged: (n 26) 98–99. Cf Heselhaus (n 34) 958 and compare Nowak (n 34) 40 (claiming that Art 21 Oviedo is itself based on French law).

[100] Oviedo Convention, Art 29; *Allen v the United Kingdom* [GC] ECHR 2013-IV (2013) 63 EHRR 10, para 133. In deciding that it had no competence to answer the first Art 29 request, the ECtHR did rely on Oviedo's Explanatory Report in its reasoning *Advisory Opinion with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine* [GC] Decision on Competence of 15 September 2021 A47-2021-001, para 65. Interestingly, it relied to a greater extent on Oviedo's *travaux préparatoires*: paras 43, 52, 54 and 65.

[101] See, moreover, Case C-237/09 *État Belge v Nathalie De Fruytier* [2010] ECR I-04985, paras 27–28 (rejecting the relevance of Oviedo's commercialisation prohibition to the Sixth VAT Directive (n 50) Art 132(1)(b)). Six years later, the Court held that the Charter's commercialisation prohibition was relevant to the same provision (*TMD* (n 32)). One could argue that taken together, these decisions imply that Art 3(2)(c) CFR is independent of and narrower than Art 21 Oviedo. Nothing suggests, however, that the Court has turned its mind to this question: *De Fruytier* fails to cite Art 3(2)(c) CFR, which had become binding only seven months beforehand, and *TMD* cites neither Oviedo nor *De Fruytier*. The better view is likely that *De Fruytier*'s reasoning on this point requires reconsideration post-*TMD*.

[102] Sobrino Heredia (n 34) 154.

[103] See eg the fifth recital of Council Directive 89/381/EEC of 14 June 1989 extending the scope of Directives 65/65/EEC and 75/319/EEC on the approximation of provisions laid down by Law, Regulation or Administrative Action relating to proprietary medicinal products and laying down special provisions for medicinal products derived from human blood or human plasma (1989) OJ L181/44.

secondary law is generally consistent with the principles set out in Oviedo's Explanatory Report and the Second Additional Protocol.[104] Nevertheless, whilst those principles have persuasive force and are likely to be followed, the Charter's commercialisation prohibition's chains are looser than they first appear.

III.e. Interim Conclusion: Article 3's Misleading Explanations

The Explanations' authority rests on their accuracy as to origins and intended scope of the Charter rights. These three examples have revealed fundamental weaknesses in this respect: the Explanations contradict the wording and drafting history in implying that Article 3 contains principles; they are wrong as to the origins and misleading as to the scope of the eugenics prohibition; and whilst they are accurate as to the origins and anchoring of the commercialisation prohibition, the clarity this appears to provide is built on a further mirage (namely overestimating the status of the Oviedo Convention's own Explanatory Report). These problems invite us to revisit the history and role of the Explanations themselves.

IV. THE HISTORY AND ROLE OF THE EXPLANATIONS

At this point, the reader likely has two questions. First, how did the Explanations, drafted alongside the Charter itself, come to be so unhelpful? Second, if Lenaerts and Gutiérrez-Fons are right that the Explanations' weight exceeds that of *travaux préparatoires*, then does the above analysis even matter? To the extent that the Explanations contradict the drafting history, on this view, the former must prevail. This final section will address these questions. It will propose a return to the more modest role for the Explanations that scholars traditionally envisaged.

The status of the Explanations under EU law has become tangled up – in my view rather unhelpfully – with the question of the status of explanatory reports under international law. Such explanatory reports are now typically recognised as part of the 'context' for the purposes of interpreting a Treaty, therefore falling within Article 31(2) of the Vienna Convention on the Law of Treaties 1969 (VCLT).[105] This is the sole basis for the claim that the Explanations have more

[104] For instance, see in respect of the 'reasonable expenses' exception Art 12(1) Directive 2004/23/EC and Art 13 Directive 2010/45/EU. Similarly, Art 13(3) Directive 2010/45/EU's wording is almost identical to that of Art 21(2) of the Second Additional Protocol to Oviedo. See further COM(2022) 338 final (n 91) 12 and recital 18.

[105] Eg A Aust, *Modern Treaty Law and Practice*, 3rd edn (Cambridge, Cambridge University Press, 2013) 211–12. See notably the Explanatory Report to Convention 223 (Protocol amending the

weight than *travaux préparatoires*, which under the VCLT may only be turned to in particular, essentially supplementary, circumstances (Article 32).[106] With respect, however, there are two flaws with this argument.

First, the CJEU does not apply the customary rules codified in the VCLT when interpreting EU (rather than international) law.[107] Under EU law, as the same book of Lenaerts and Gutiérrez-Fons's acknowledges, *travaux préparatoires* have a 'growing importance' to interpretation and 'the more the *travaux préparatoires* are accessible to the public, the more the Court tends to take them into account'.[108] It is misconceived, then, to rely on Articles 31–32 VCLT to assert a hierarchy under EU law between the Explanations and the Charter *travaux préparatoires*.

Second, explanatory reports fall within Article 31(2) on the premise that they were 'approved by the government experts involved in drafting conventions'.[109] This premise simply does not apply to the Charter Explanations. To see why, we need to return to the history of this curious document. Fortunately, we

Convention for the Protection of Individuals with regard to Automatic Processing of Personal data, CETS 223) para 6, expressly stating that the Explanatory Report has been endorsed and forms part of the 'context' within the meaning of Art 31(1) and (2) VCLT.

[106] See Lenaerts and Gutiérrez-Fons (n 4) para 237 and Bailleux (n 23) para 60. Art 31(1) VCLT provides that '[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty *in their context* and in light of its object and purpose' (emphasis added), with the remaining paragraphs providing further detail on the meaning of 'context' and other relevant factors. Art 32 provides for recourse to 'supplementary means of interpretation, *including the preparatory work* of the treaty and the circumstances of its conclusion' (emphasis added), but only 'to confirm the meaning resulting from the application of article 31' or to determine the meaning when that application 'leaves the meaning ambiguous or obscure' or 'leads to a result which is manifestly absurd or unreasonable'.

[107] Joined Cases T-27/03, T-46/03, T-58/03, T-79/03, T-80/03 and T-98/03 *SP SpA and others v Commission* [2007] ECR II-04331, para 58. This is a rare explicit statement of long-standing practice: see the case law cited in K Schmalenbach, 'Article 5' in O Dörr and K Schmalenbach (eds), *Vienna Convention on the Law of Treaties: A Commentary*, 2nd edn (Berlin, Springer, 2018), para 9. In rare cases, the Court has referred to certain VCLT provisions in interpreting primary law: eg Case C-621/18 *Wightman and Others* EU:C:2018:851, para 79; Case C-264/09 *Commission v Slovakia* [2011] ECR I-08065, para 41. But the Court was not interpreting the EU provision using the rules codified in Arts 31–32 VCLT. Instead, these were cases where the EU provision's drafting was influenced by or in conformity with another VCLT provision. Ironically, in *Wightman* it was the EU provision's *travaux préparatoires* that showed this link. Conversely, the Court regularly invokes the interpretative rules codified in the VCLT when interpreting international law: eg Case C-266/16 *Western Sahara Campaign UK* EU:C:2018:118, para 58. For a different view, see G Beck, 'The Court of Justice of the EU and the Vienna Convention on the Law of Treaties' (2016) 35(1) *Yearbook of European Law* 484, 489–90, 493 and 512 (agreeing that the CJEU does not, in substance, apply Articles 31–32 VCLT, but asserting that the Court is in fact bound by those provisions).

[108] Lenaerts and Gutiérrez-Fons (n 4) title of Chapter II, section B, and para 49 (my translation). See also S Miettinen and M Kettunen, '*Travaux* to the EU Treaties: Preparatory Work as a Source of EU Law' (2015) 17 *Cambridge Yearbook of European Legal Studies* 145, 150 and 153. The Charter's *travaux préparatoires* have been theoretically available but in practice difficult to access until recently: see Coghlan and Steiert (n 1) 8-9 and 15–16.

[109] Aust (n 105) 211. Compare the Opinion of AG Bobek in Case C-574/15 *Scialdone* EU:C:2017:553, paras 34–46 and especially para 38.

have excellent sources on which to draw, including the accounts of two of the Explanations' chief drafters, Jean-Paul Jacqué and Clemens Ladenburger.[110]

Ambivalence and ambiguity shrouded the Explanations' development during the Charter Convention. On the one hand, they developed as a purportedly neutral text listing the origins of the Charter rights. They were drafted almost exclusively by the Secretariat.[111] A May draft was the first to suggest that they might be published, but it also insisted that Convention members should submit no amendments to them.[112] Whilst the near-final 31 July draft did invite amendments, it also insisted that the Explanations were 'as factual as possible … refraining from any attempt to interpret the Charter'.[113]

The Explanations were 'never approved or even discussed in detail' by the Charter Convention.[114] Expressing many members' views, the MEP Kaufmann dismissed them as 'nothing but a Praesidium document without any legal value' in the final Convention meeting.[115] In fact, however, even the Praesidium's involvement was limited. They were adopted 'three weeks after the close of that Convention by the Praesidium in a written procedure', the Praesidium in turn accepting the Secretariat's drafting 'without comment'.[116] Three of the six Praesidium members have deprecated the relevance of the Explanations. Braibant, for instance, insisted that 'they were drafted under the sole responsibility of the Praesidium, which incidentally did not have the time to examine them in detail, and that they were neither submitted to the informal [European Council] summit in Biarritz, nor proclaimed in the formal [European Council] summit in Nice; they do not thus have political or legal authority'.[117] The Explanations, whose preamble stated that they had 'no legal value', were not published in the Official Journal alongside the Charter in 2000; nor did that version of the Charter contain any reference to them.[118]

[110] Jacqué (n 14) and Ladenburger (n 14). See also Ziller (n 14) and Miettinen and Kettunen (n 108) 151–52.

[111] Jacqué (n 14) paras 62.01 and 62.07; Méndez de Vigo (n 74) 327.

[112] Praesidium of the Charter Convention, 'Draft Charter of Fundamental Rights of the European Union' (12 May 2000) CHARTE 4303/00.

[113] Praesidium of the Charter Convention, 'Text of the explanations relating to the complete text of the Charter as set out in CHARTE 4422/00 CONVENT 45' (31 July 2000) CHARTE 4423/00.

[114] Ladenburger (n 14) 348–49. See, to the same effect, Braibant (n 26) 263 and see also 37.

[115] Praesidium of the Charter Convention, 'Verbatim de la réunion de la Convention du 26 septembre 2000' (27 October 2000) CHARTE 4958/00, 28 (Kaufmann); compare 47 (Rodotà), Neisser (49), but cf Olsen (49). See also Meyer and Engels (n 59) 478–79 (citing Manzella, Barros Moura, Meyer and Jansson).

[116] Respectively Ladenburger (n 14) 348–49; and Jacqué (n 14) para 62.01.

[117] Braibant (n 26) 263 (my translation) and see also 37. The other two Praesidium members are the EP representative Méndez de Vigo (Méndez de Vigo (n 74) 327–28) and the national parliament representative Gunnar Jansson (see Meyer's contemporary report to the German Legislature of the Parliamentarians' meeting of 11–12 September 2000 (Meyer and Engels (n 59) 478)).

[118] Charter of Fundamental Rights of the European Union [2000] OJ C364/1.

At the same time, at least some Charter Convention members intended for the Explanations to have some effect. They were never simply the technical compendium they claimed to be. They also developed to provide express reference to ECHR limitations without needing to incorporate these into the rights themselves, thus ensuring a balance between concision and legal rigour and short-circuiting certain constitutional debates.[119] Further, as we saw above in relation to Article 3, they also served strategic purposes: they could enable innovations to be presented as continuity. Finally, in some cases amendments were made to the Explanations in order to defuse disputes and reach consensus: as noted above, this included the addition of wording concerning therapeutic cloning in Article 3's Explanations.[120]

Returning to legal status, then, the Explanations were not approved by the Charter Convention. On the contrary, their value was dismissed by multiple Convention members and at least half of the Praesidium. In VCLT terms, they would thus arguably fall outside of Article 31(2); in EU law terms, Lenaerts and Gutiérrez-Fons's claim that they should be given weight because the Charter Convention 'insisted on their importance' is simply incorrect. These factors, together with the marginal and ambiguous status of the Explanations throughout most of the Convention and their multiple, at times conflicting, aims, likely explains how the Explanations to Article 3 came to be quite so unhelpful.

Of course, the Charter Convention was not the end of the story. During the subsequent Second Convention and Inter-Governmental Conferences which led to the Charter becoming binding, the prominence and status of the Explanations were increased. A combination of work by Vitorino (head of the relevant Working Group in the Second Convention) and pressure from the United Kingdom[121] led to the removal of the phrase 'no legal value' from the Explanations and to

[119] Ziller (n 14) 766–68; Jacqué (n 14) paras 62.04–62.06. They also sought to placate Lord Goldsmith, who had proposed a Charter split into a terse list of rights (Part A) complemented by detail on their nature, extent and application (Part B). On that role, see the same paragraphs of Jacqué and, as primary evidence, Praesidium of the Charter Convention, 'Contribution from the former President of the Federal Republic of Germany, Roman Herzog, relating to Articles 1 to 7' (15 June 2000) CHARTE 4371/00. For an example of Goldsmith's proposal, see Praesidium, CHARTE 4146/00 (n 72).

[120] Jacqué (n 14) paras 62.14–62.18; Ladenburger (n 14) 350.

[121] On Vitorino, see WG II–WD 27 (n 48) 5, and see also Secretariat of the European Convention, 'Summary of the meeting held on 17.09.02 chaired by Commissioner António Vitorino' (26 September 2002) CONV 295/02, 8; Chairman of Working Group II, 'Final report of Working Group II' (22 October 2002) CONV 354/02, 10; and Secretariat, 'Auditions of MM Schoo, Piris and Petite, on 23 juillet 2002' (5 September 2002) WG II–WD 13, 15 (all available in Coghlan and Steiert (n 1)). On the UK, see Ladenburger (n 14) 348–49; Jacqué (n 14) paras 62.08–62.09; and Méndez de Vigo (n 74) 327–28.

the progressive addition of the three requirements to pay 'due regard' to them.[122] But this does not retroactively render them a reliable guide to the history or drafting intentions of the original Charter. Nor can it remove the autonomy of those rights, tethering them to their purported sources.[123] Nor, finally, does it elevate them above other methods of interpretation or prevent the Court from going against them. *That* is what would amount to judicial activism:[124] it would be to interpret the Charter 'strictly in accordance' with the Explanations (the phrase wrongly used in the recitals to Protocol (No 30)) rather than with 'due regard' to them (as primary law requires).

In this light, I respectfully endorse the view of one of the Explanations' drafters: 'their relevance should not be higher than that of an "explanatory memorandum" and … the courts [should] feel legally free to discard them where other tools of interpretation so suggest'.[125] The Explanations should be subject to critical scrutiny and should compete with other means of interpretation. In particular, where other means of interpretation suggest that the Explanations are wrong on their own terms (as to the sources or drafters' intentions), the Court cannot be required to ignore this. As Ladenburger suggests, an exception to this consists of cases where the Explanations clearly enshrine a deliberate Charter Convention compromise: here, more deference to the Explanations is appropriate.[126]

There are drawbacks to this approach. The Charter's wording is often vague. The *travaux préparatoires* (around 5,000 pages) are much longer than the Explanations (19 pages). There are legitimate concerns about interpretation becoming too dependent on deep *travaux* research.[127] Those concerns are perhaps less strong in the case of open-textured fundamental rights than precise individual secondary law provisions. The key point, however, is that so long as primary law only requires 'due regard' to the Explanations, those Explanations'

[122] First in the preamble (Praesidium of the European Convention, 'Revised texts' (12 June 2003) CONV 811/03, 5), then in Art 52(7) CFR (Presidency of the Conference of the Representatives of the Governments of the Member States, 'IGC 2003 – Ministerial Meeting, Luxembourg, 14 June 2004' (12 June 2004) CIG 80/04, 21) and finally in Art 6(1) TEU (Presidency of the Council of the European Union, 'Presidency Conclusions of the Brussels European Council (21/22 June 2007)' (20 July 2007) Council Document 11177/1/07 REV 1, Annex I, 25–26).

[123] This point is underlined by the fact that the CJEU has consistently defended the autonomy of Charter rights as against their corresponding ECHR rights, notwithstanding the clear and binding obligation to give the former the same 'meaning and scope' as the latter, subject only to the possibility of higher protection: Art 52(3) CFR, and for instance Case C-601/15 PPU *JN v Staatssecretaris voor Veiligheid en Justitie* EU:C:2016:84, paras 45–47. This autonomy must apply a fortiori to non-ECHR sources where no such primary law obligation exists.

[124] cf Lenaerts and Guitérrez-Fons (n 4) para 238.

[125] Ladenburger (n 14) 349–50. See also Case C-617/10 *Åklagaren v Hans Åkerberg Fransson* EU:C:2012:340, Opinion of AG Cruz Villalón, para 25, cited in Bailleux (n 23) para 62.

[126] Ladenburger (n 14) 350.

[127] See Case C-129/19 *Presidenza del Consiglio dei Ministri v BV* EU:2020:375, Opinion of AG Bobek, paras 117–24 and Miettinen and Kettunen (n 108) 162–65.

authority will depend on their being a useful guide to the history and sources of the Charter or intentions of its drafters. They must, therefore, remain open to challenge where this is not the case.

V. CONCLUSION

Under primary law, the Explanations are of persuasive value only. Their persuasiveness depends on their accuracy as to the origins or intentions of the Charter. In this respect, they compete with other binding and persuasive means of interpretation. In particular, recent claims that the Explanations enjoy an *a priori* hierarchy over the Charter's *travaux préparatoires* or that the Court cannot go against the Explanations are misconceived.

In the case of Article 3, the Explanations appear to clarify the history and intended scope of various aspects of this particularly new and important right. On closer inspection, however, much of this clarity is a mirage: the drafters intended Article 3 to contain only rights, not principles; the eugenics prohibition originates in French law, is deliberately flexible, and is neither based on nor subject to the Oviedo Convention or Rome Statute; and the non-commercialisation prohibition does reflect Article 21 Oviedo, but this does less to restrict the shape of that prohibition than first appears. The Explanations provide bridges to nowhere. The new seed of Article 3, crafted with care by the Charter Convention, should not have its growth pre-determined or stunted. This right, like the persons it protects, must be autonomous – not a clone.

This leads to one final reflection. We have seen the rather curious history of the Explanations. They seem to merit less weight than other explanatory documents because of the indifferent and even hostile attitude of the Charter Convention's members and Praesidium towards them. In respect of Article 3 at least, they suffer several of the flaws found in certain EU soft law documents: low transparency, weak drafting procedure and substantive flaws and incoherence, including weakening and even contradicting the hard law they purport to interpret.[128] Yet other consequences of their curious history seem to suggest they enjoy more authority than the average soft law: the authors were involved in the Charter Convention, parts of the Explanations do embody specific drafter compromises, and the Treaties specifically require courts to give them due regard. Ironically, then, the very ambiguity and ambivalence that partly caused the Explanations' flaws are also what appear to place them outside of ordinary categories of EU soft law, tempting some to treat them like hard law.[129] This seductive appearance is – as I hope to have shown – a further mirage.

[128] J Scott, 'In Legal Limbo: Post-legislative Guidance as a Challenge for European Administrative Law' (2011) 48(2) *CML Rev* 329, esp 347.

[129] Compare DP Ionescu and M Eliantonio, 'Democratic Legitimacy and Soft Law in the EU Legal Order: A Theoretical Perspective' (2021) 17(1) *Journal of Contemporary European Research* 43, 47.

Annex

The Charter Convention: *Evolution of Article 3 CFR and its Explanations, March–October 2000*						Second Convention and ICG revisions, 2003–2004[130]
8 March (CHARTE 4149/00)	5 May (CHARTE 4284/00)	14 June proposal (CHARTE 4360/00)	28 July (CHARTE 4422/00)[131]	14 September (as final) (CHARTE 4470/00)[132]	*Revised Explanations dated 11 October* (CHARTE 4473/00)	
Right to the respect of integrity	Right to ~~the~~ respect **for the** ~~of~~ integrity **of the human person**	Right to respect for the integrity of the human person	Right to ~~respect for~~ the integrity of the ~~human~~ person	Right to the integrity of the person		Right to the integrity of the person
1. Everyone has the right to the respect of his physical and mental integrity.	1. Everyone has the right to ~~the~~ respect **for** ~~of~~ his physical and mental integrity.	1. Everyone has the right to respect for his physical, **genetic** and mental integrity.	1. Everyone has the right to respect for his physical, ~~genetic~~ and mental integrity.	1. Everyone has the right to respect for his **or her** physical and mental integrity.		1. Everyone has the right to respect for his or her physical and mental integrity.
2. In the fields of medicine and biology, the following principles in particular must be respected:	2. In the fields of medicine and biology, the following principles ~~in particular~~ must be respected **in particular**:	2. In the fields of medicine and biology, the following principles must be respected in particular:	2. In the fields of medicine and biology, the following principles must be respected in particular:	2. In the fields of medicine and biology, the following ~~principles~~ must be respected in particular:		2. In the fields of medicine and biology, the following must be respected in particular:

[130] The relevant parts of the draft Constitutional Treaty are [2004] OJ C310/42 and [2004] OJ C310/427. Art 3(2)'s paragraph numbering appears to have been added in CONV 797/1/03 REV 1 dated 12 June 2003. The Explanations were revised by António Vitorino in document WG II–WD 27 dated 3 June 2003, with subsequent minor formatting changes. This Constitutional Treaty version of Article 3 and its Explanations are materially identical to the one currently in force (cited in the main text).

[131] The Explanations were circulated separately in CHARTE 4423/00, dated 31 July 2000.

[132] The Explanations were circulated separately in CHARTE 4471/00 dated 20 September 2000. The words 'or her' were added following finalisation by the Legal Linguistic Working Party (CHARTE 4470/1/00 REV1, dated 21 September 2000). The subsequent substantive amendment (CHARTE 4470/1/00 REV1 ADD1) did not alter Article 3.

– prohibition of eugenic practices	– prohibition of eugenic practices;	– prohibition of eugenic practices, **in particular those concerned with**[133] **the selection and instrumentalisation of persons**;	– ~~respect for the~~ free and informed consent of the **person concerned,**	– **the** free and informed consent of the person concerned, **according to the procedures laid down by law,**		(**a**) the free and informed consent of the person concerned, according to the procedures laid down by law;
– respect of the informed consent of the patient	– respect **for** ~~of~~ the informed consent of the patient;	– respect for the **free and** informed consent of the patient;	– prohibition of eugenic practices, in particular those concerned with the selection ~~and instrumentalisation~~ of persons,	– **the** prohibition of eugenic practices, in particular those **aiming at** the selection of persons,		(**b**) the prohibition of eugenic practices, in particular those aiming at the selection of persons;
– prohibiting the making of the human body and its products a source of financial gain	– prohibit**ion of** ~~the~~ making ~~of~~ the human body and its products a source of financial gain;	– prohibition of making the human body and its **parts** a source of financial gain;	– prohibition o**n** making the human body and its parts a source of financial gain,	– **the** prohibition on making the human body and its parts **as such** a source of financial gain,		(**c**) the prohibition on making the human body and its parts as such a source of financial gain;
– prohibition of the cloning of human beings	– prohibition of the **reproductive** cloning of human beings.	– prohibition of the reproductive cloning of human beings.	– prohibition of the reproductive cloning of human beings.	– **the** prohibition of the reproductive cloning of human beings.		(**d**) the prohibition of the reproductive cloning of human beings.

(continued)

[133] This appears to be a translation error, as the original French version reads 'those which have as their goal …' (my translation); see further the 14 September amendment.

(Continued)

The Charter Convention: *Evolution of Article 3 CFR and its Explanations, March–October 2000*						Second Convention and ICG revisions, 2003–2004
8 March (CHARTE 4149/00)	5 May (CHARTE 4284/00)	14 June proposal (CHARTE 4360/00)	28 July (CHARTE 4422/00)	14 September (as final) (CHARTE 4470/00)	*Revised Explanations dated 11 October* (CHARTE 4473/00)	
Statement of reasons *These principles are set out in the Convention on Human Rights and Biomedicine. They are accompanied by separate provisions on consent, particularly where a person is unable to give his consent, and by restrictions. It is not the aim of this Charter to derogate from those provisions. The list is not exhaustive, allowing for its development to take account of future progress in this area.*	Statement of reasons *These principles are set out in the Convention on Human Rights and Biomedicine.* ~~*They are accompanied by separate provisions on consent, particularly where a person is unable to give his consent, and by restrictions.*~~ *It is not the aim of this Charter to derogate from those provisions. The list is not exhaustive, allowing for* ~~*its*~~ *development to take account of future progress in this area.*	[*No statement of reasons*]	EXPLANATIONS *The principles of this Article are already included in the Convention on Human Rights and Biomedicine.* ~~*It is not the aim of this Charter to derogate from those provisions.*~~ **The Charter does not set out to depart from those principles.** ~~*The list is not exhaustive, allowing for development to take account of future progress in this area.*~~	EXPLANATIONS *The principles of this Article are already included in the Convention on Human Rights and Biomedicine. The Charter does not set out to depart from those principles.* ***The fact that only reproductive cloning is prohibited does not prevent the legislature from prohibiting other forms of cloning. It neither authorises nor prohibits other forms of cloning. The reference to eugenic practices, in particular those aiming at the selection of persons, relates to possible situations in which selection programmes are organised and implemented, involving campaigns for sterilisation, forced pregnancy, compulsory ethnic marriage among others, all acts deemed to be international crimes in the Statute of the International Criminal Court signed in Rome.***	EXPLANATIONS *[1.] The principles of* ~~*this*~~ ***Article 3 of the Charter*** *are already included in the Convention on Human Rights and Biomedicine,* ***adopted by the Council of Europe (ETS 164 and additional protocol ETS 168).*** *The Charter does not set out to depart from those principles,* ***and therefore prohibits*** ~~*The fact that*~~ *only reproductive cloning* ~~*is prohibited does not prevent the legislature from prohibiting other forms of cloning*~~*. It neither authorises nor prohibits other forms of cloning.* ***Thus it does not in any way prevent the legislature from prohibiting other forms of cloning.***	EXPLANATIONS **1. In its judgment of 9 October 2001 in case C-377/98 Netherlands v European Parliament and Council, [2001] ECR 7079, at grounds 70, 78–80, the Court of Justice confirmed that the fundamental right to human integrity is part of Union law and encompasses, in the context of medicine and biology, the free and informed consent of the donor and recipient.** 2. [Identical to para. 1 of CHARTE 4473/00]. 3. [Identical to para. 2 of CHARTE 4473/00].

					2. The reference to eugenic practices, in particular those aiming at the selection of persons, relates to possible situations in which selection programmes are organised and implemented, involving campaigns for sterilisation, forced pregnancy, compulsory ethnic marriage among others, all acts deemed to be international crimes in the Statute of the International Criminal Court ***adopted*** ~~*signed*~~ *in Rome* ***on 17 July 1998*** *(****see its Article*** *7(1)(****g****)).*[134]	

[134] The English version of the Explanations mistakenly omits the paragraph numbering for the first paragraph. The original French version includes it.